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CONFLICT IN CONFLICTS— VESTED RIGHTS VERSUS PROPER LAW: AN ENGLISH DON READS *BABCOCK*

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THE PROBLEM FACING the New York Court of Appeals in *Babcock v. Jackson*¹ is not of a kind that has yet come before an English court for solution. Accordingly the case has much in it to interest English conflict lawyers.

The facts are simple. On September 16, 1960, Miss Georgia Babcock and her friends Mr. and Mrs. Jackson, all of whom were residents of Rochester, New York, left Rochester in Mr. Jackson's automobile, with a view to taking a week-end trip to Canada. Miss Babcock was a guest in the car. Some time after the party reached Ontario, Mr. Jackson evidently lost control of the automobile; it left the road, hitting a stone wall, and Miss Babcock was badly injured. On her return to New York, she instituted a negligence suit against Mr. Jackson. Mr. Jackson subsequently died, and his executrix was substituted as defendant in his place.² At the time of the accident there was in force in Ontario a statutory provision that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle."³ There is no such rule as this in New York, whose legislature has repeatedly refused to enact a

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1. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

2. Cf. Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, § 1 (3).

3. Highway Traffic Act § 105 (2); ONT. REV. STAT. ch. 172 (1960).

statute on these lines. A traditionalist approach would, needless to say, demand that the Court of Appeals deny recovery—the decedent's conduct may have been tortious, but there was this special element, namely, the guest statute operating in the *lex loci*, which prevented a cause of action against the decedent from ever coming into existence in the plaintiff's favour.⁴ The majority of the court⁵ boldly threw tradition to the winds and, in so doing, freely admitted that Homer, even in the august shape of Holmes, J., has nodded.⁶ They held that the state which had the more dominant contacts and the superior claim for application of its law as to whether the plaintiff was, as guest, barred from recovery was the state of New York, for it was there that the parties resided, there that the guest-host relationship arose, and there that the car trip was to begin and to end. Ontario could thus be relegated to limbo as being merely the fortuitous *locus* of the accident (and thus having but a minimal contact with the factual consideration); there was "no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious by Ontario law."⁷ Recovery was accordingly allowed.

The application of a "grouping of contacts" theory, as in *Auten v. Auten*,⁸ will not strike English conflict lawyers as new-fangled.

4. See, e.g., LEFLAR, *CONFLICT OF LAWS* 209 (1959); EHRENZWEIG, *CONFLICT OF LAWS* 577 (1962), and cases cited therein.

5. Fuld, J., delivered the judgment, and Desmond, C.J., and Dye, Burke and Foster, JJ., concurred with him. Van Voorhis, J., delivered a dissenting judgment with which Scileppi, J., concurred.

6. This has been accomplished by the court's refusal to accept the doctrine of vested rights as espoused by Holmes in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 24 S.Ct. 581 (1904), accepting instead *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 379, comment *d* and *e* (Tent. Draft No. 8, 1963).

7. 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

8. 308 N.Y. 155, 124 N.E.2d 99 (1954). This was an action to recover installments allegedly due under a separate maintenance agreement executed in New York in 1933. Plaintiff and defendant were married in England in 1917 and lived there until 1931 when defendant allegedly deserted his family and went to Mexico where he obtained a divorce and then proceeded to marry another woman.

The plaintiff came to New York seeking some mode of settlement, and the outcome was the separate maintenance agreement of 1933. The agreement also provided that neither party should sue in any action relating to their separation and that the wife should not cause any complaint to be lodged against her husband. The wife then returned to England. The defendant did not live up to the agreement so that in 1934 the plaintiff filed a petition for separation in an English court. Alimony pendente lite was ordered, but the case never came to trial.

In 1947 the defendant, having realized nothing from the English action and little by reason of the New York action, sued on the 1933 New York separation agreement for back payments. The defendant claimed that the 1934 English suit was a repudiation of the 1933 agreement and demanded dismissal by way of summary judgment which was granted. The lower court's decision was based on New York law which evidently held that the 1934 action did indeed amount to a repudiation of the 1933 agreement.

The New York Court of Appeals held, however, that English law should have been applied owing to the fact that that was the country with all the signifi-

They have become accustomed to this approach ever since Lord Simonds, in a Privy Council case, *Bonython v. Commonwealth of Australia*,⁹ declared that the proper law of a contract was "the system of law by reference to which the contract was made or that with which the transaction has the closest and most real connexion." This test has been accepted by the House of Lords itself and was applied by it in *In re United Rys. & Regla Warehouses Ltd.*,¹⁰ as an English conflict rule. McNair, J., utilised it also in *Rossano v. Manufacturer's Life Ins. Co.*¹¹ in order to ascertain the proper law of three endowment policies of insurance. It is, however, regrettably the case that no English court has yet overtly applied this doctrine in the sphere of tort. That this is the case is due to that rigid adherence to the doctrine of *stare decisis* which prevents English courts from departing from the much and justly maligned rule in *Phillips v. Eyre*.¹² This states that an act done in a foreign country is a tort and actionable as such in England only if it is *both* (i) an act which would be a tort had it been done in England, *and* (ii) "not justifiable" according to the law of the foreign country where it was done. The highly unfortunate double-barreled nature of this rule and the refinements that have been made of it have incurred almost universal opprobrium¹³ and, taken together, they elicit nothing but envy of the good sense displayed not only by the court in the present decision, but also by the results achieved in cases such as *Kilberg v. Northeast Airlines, Inc.*¹⁴ and

cant contacts. Thus, the case was remanded to determine and apply the proper English Law.

Accord, *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945); Comment, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553 (1957); Comment, *Conflict of Laws and the Discharge of Contracts: An Approach*, 57 COLUM. L. REV. 700 (1957).

9. [1951] A.C. 201, 219 (P.C. 1950) (Austl.).

10. [1961] A.C. 1007 (1960).

11. [1962] 3 Weekly L.R. 157 (Q.B.).

12. [1870] 6 Q.B. 1, 28-29, per Willes, J. The rule as a whole has been accepted in the House of Lords. See *Carr v. Fracis Times & Co.*, [1902] A.C. 176, 182 (1901), per Lord Macnaghten. Lord Lindley, at 184, clearly accepted part (ii) of it. It was generally accepted by the Court of Appeals recently in *In re United Rys. & Regla Warehouses, Ltd.*, [1960] ch. 52, 98 (C.A.), per Jenkins, L.J. No reference to this point was made by the House of Lords on appeal.

13. See CHESHIRE, *PRIVATE INTERNATIONAL LAW* 286 nn.3-9 (6th ed. 1961).

14. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The salient facts in this case were as follows: plaintiff's intestate boarded a plane in New York destined for Massachusetts. The plane crashed in Massachusetts causing the death of the intestate. There was in effect at the time of the disaster a provision of the General Statutes of Massachusetts which gave a cause of action against a common carrier for negligently causing a passenger's death, but limited to not less than \$2,000 or more than \$15,000 the damages to be awarded therefore.

The New York Court of Appeals held that while the New York Court could enforce the Massachusetts cause of action, it did not have to consider the damage limitations. This was a purely procedural matter. Thus, plaintiff was allowed his full measure of damages.

Grant v. McAuliffe.¹⁵ Similarly, nothing but sympathy can be evoked by the strictures of Judge Frank in *Walton v. Arabian Am. Oil Co.*¹⁶

It is naturally tempting to an English lawyer to hazard a guess as to how an English court might have solved the present case *mutatis mutandis*—that is, assuming the accident still to have occurred in Ontario, but that Mr. and Mrs. Jackson and their guest, Miss Babcock, had all been residents of, for example, Rochester in the English county of Kent, and had gone to Canada for a holiday from there. Like New York, England has no guest statute. Applying the English choice of law rule, it would be clear that the first “arm” of it would be satisfied. The deceased’s conduct was admittedly negligent, so that there could be no doubt that, had the accident occurred in England, it would have rendered the driver liable in tort. It is the second “arm” of the rule that would give rise to difficulty. Assistance might be derived from a decision of the Supreme Court of Canada in *McLean v. Pettigrew*.¹⁷ There, the plaintiff had been travelling as guest in the defendant’s car and had been injured in Ontario owing to the defendant’s careless driving. Both parties were residents of, and domiciled in Quebec, where the plaintiff subsequently sued the defendant. The statute law of Ontario, which was the *lex loci* as in the case under review, then contained a provision indistinguishable from the present law.¹⁸ By the law of Quebec, the *lex fori*, a driver could be made civilly liable towards his guest by means of an action in quasi-delict under the Civil Code of Quebec, Article 1053. The defendant had in fact been prosecuted in Ontario under section 27 of the Ontario Highway Traffic Act for driving without due care and

15. 41 Cal.2d 859, 264 P.2d 944 (1953). In this case plaintiffs, residents of California, were injured in an accident in Arizona when their car collided with that of the defendant’s decedent. Under the law of Arizona the cause of action did not survive the death of the defendant’s decedent, but under California law it did. Thus, the plaintiffs sued in California. The trial court granted the defendant’s motion to abate. The Supreme Court of California reversed, holding that whether or not a cause of action survived was a question of procedure and was thus to be determined by the law of the forum.

16. 233 F.2d 541 (2d Cir. 1956). Here, plaintiff, a citizen of the United States, was injured by defendant’s servant while temporarily in Saudi Arabia. Defendant was licensed to do business in New York, and plaintiff therefore selected that forum for suit. The plaintiff did not alleged or prove the law of Saudi Arabia; thus, the federal district court dismissed on the ground that the law of New York (this was a diversity case) required a pleading of the foreign law. Judge Frank said during the course of the opinion:

Both the parties are Americans. The plaintiff was but a transient in Saudi Arabia when the accident occurred and has not been there since that time. The defendant company engages in extensive business operations there, and is therefore in a far better position to obtain information concerning the law of that country. But, under the New York decisions which we must follow, plaintiff had the burden. As he did not discharge it, a majority of the court holds that the judge correctly gave judgment for the defendant. *Id.* at 545.

17. [1945] Can. Sup. Ct. 62, [1945] 2 D.L.R. 65 (1944).

18. Highway Traffic Act, § 47(2), R.S.O. c. 288 (1937).

attention, but the local magistrate had acquitted him. The Supreme Court took the view that the plaintiff could succeed: both “arms” of the choice of law rule were regarded as having been satisfied. As regards the second “arm,” the Court held that the defendant’s conduct was “not justifiable” notwithstanding the Ontario statutory provision denying a right of action to a guest. Following another much maligned English decision, *Machado v. Fontes*,¹⁹ but without any attempt to analyse it at all, it was considered that the second “arm” of the *Phillips* rule was still satisfied if it could be shown that the Ontario magistrate had been wrong in acquitting the defendant of careless driving.²⁰ The trial judge, the Quebec Court of Appeal and the Canadian Supreme Court appear to have shared the view that the defendant had not driven with due care and attention and were thus agreed that his conduct had been criminal according to the *lex loci*.²¹ It is beyond peradventure that this result is defensible upon either a “grouping of contacts” theory or a “proper law of the tort”²² basis. But it has to be remembered that the court applied neither of these tests. The rule in *Phillips* as extended by *Machado*, which is what the court did apply, lays itself open to severe criticism—especially, indeed, to the charge that it distinctly encourages “forum-shopping.”

On the other hand, there must be mentioned a decision of the Quebec courts, *Lieff v. Palmer*.²³ There the plaintiff, domiciled and resident in Ontario, had been injured in Ontario whilst riding as guest in the automobile of the defendant, who was also domiciled and resident in Ontario. Again, the Ontario law deprived the plaintiff of her right of recovery. Nothing daunted, however, she sued in Quebec, arguing that the defendant had driven carelessly and thus criminally within the meaning of the criminal law of Ontario. This ought, according to *Machado*, to have enabled the plaintiff to succeed. That she did not is due to two factors: (a) Rivard and Letourneau, J.J., realised that the plaintiff was invoking *Machado* simply in order to “forum-shop” and therefore declined to follow it, and (b) Galipeault, Walsh, Barclay and Rivard, J.J., decided that there was no proof that

19. [1897] 2 Q.B. 231 (C.A.). It was there held that if *A* published a statement in Brazil which libelled *B*, *B* could successfully sue *A* for libel in England even assuming that libel was only a crime according to Brazilian law and gave rise to no action in tort at all.

20. The civil courts are not bound by an acquittal on a charge of careless driving. *La Fonciere v. Perras*, [1943] Can. Sup. Ct. 165, [1943] 2 D.L.R. 129 (1943).

21. DICEY, *CONFLICT OF LAWS* 937-39 (7th ed. 1958), reproduced in WEBB & BROWN, *CONFLICT OF LAWS* 294-95 (1960); cf. the strictures of EHRENZWEIG, *op. cit. supra* note 4, at 548, 580-81; Morris, *Torts in the Conflict of Laws*, 12 MODERN L. REV. 248 (1949); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1950).

22. CHESHIRE, *op. cit. supra* note 13, at 286-87.

23. [1937] 63 Qué. B.R. 278. See especially at 285, per Rivard, J.; cf. *Williams v. Tang & Mitchell*, [1933] 2 West Weekly R. 113.

the defendant's lack of care was such as to render him criminally liable under Ontario law. This result conforms not only to that which would be achieved by applying a "grouping of contacts" theory or a "proper law" doctrine, but also to what a strict application of the rule in *Phillips* would demand if untrammelled by *Machado*. Assuming, then, that Mr. Jackson's driving had been criminal in the eyes of Ontario law, an English court prepared to follow the Canadian Supreme Court would find for Miss Babcock. Were the driving not criminal, she would fail. If, however, the English court were prepared to prefer the Quebec approach, it would deny recovery whether or not Mr. Jackson's driving contravened Ontario criminal law.

It will be recalled that Fuld, J., stated in the case under review :

The object of Ontario's guest statute, it has been said, is to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies, . . . and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers. . . . Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction.²⁴

This view of the law does not seem to have been explicitly taken by either of the courts which decided the Canadian cases mentioned above. However, since the results achieved are in conformity with the views of Fuld, J., it may well be that the point was implicitly taken by both Canadian courts. It is thought that, to return to the hypothetical "English" *Babcock v. Jackson* posited earlier, an English court might well be prepared to solve it by adopting the same approach as Fuld, J. Without troubling whether the driver's conduct was or was not criminal by the law of Ontario, it could easily hold that both "arms" of the rule were satisfied. The first "arm" would present no difficulty at all; since the driver was not an Ontario defendant, but an English one, his driving in Ontario would still be negligent and "not justifiable," so that the second "arm" would in fact be fulfilled. Whether an English court would be willing to classify the Ontario statute in this way, of course, remains to be seen, for it is entitled to form its own opinion on the matter.²⁵

One last possibility is that the case might be presented to the English court as if it were a purely domestic case, that is to say,

24. 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

25. See *Huntington v. Attrill*, [1893] A.C. 150 (P.C. 1892).

without its ever being treated as a conflicts problem and no mention being made of the *lex loci delicti*. Just as this situation has occurred in the past in the United States,²⁶ so it has occurred in England in the recent case of *Schneider v. Eisovitch*.²⁷ In this case the plaintiff widow sued in order to recover, *inter alia*, damages (a) as personal representative of her late husband, in respect of his death which had occurred in France owing to the defendant's negligent driving in France of the car in which the plaintiff and her husband had been riding as passengers, and (b) in her own right, for nervous shock. The defendant, as in the present case, conceded liability. The plaintiff recovered damages under both heads, the case being treated throughout as if the accident had happened in Brighton, where the couple's matrimonial home was situated. No one can deny that this result is as just as that which was reached in *Babcock*, but English conflict lawyers are still somewhat mystified as to how it was in fact achieved.

26. See, e.g., LEFLAR, *op. cit. supra* note 4, at 208, and cases cited therein.

27. *Schneider v. Eisovitch*, [1960] 1 All E.R. 169 (Q.B. 1959). Webb, *The Conflict of Laws and the English Fatal Accidents Acts*, 24 MODERN L. REV. 467 (1961).